IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 29, 2005

STATE OF TENNESSEE v. DALE RAY MILLS

Direct Appeal from the Circuit Court for Sevier County
No. 10423 Rex Henry Ogle, Judge

No. E2005-00700-CCA-R3-CD - March 15, 2006

Following a jury trial, Defendant, Dale Ray Mills, was convicted of simple possession of marijuana, a Class A misdemeanor. The trial court sentenced him to eleven months, twenty-nine days but suspended all but 150 days of Defendant's sentence and placed him on probation. On appeal, Defendant argues (1) that the evidence is insufficient to support the conviction and (2) that the trial court erred by considering inappropriate sentencing enhancement factors and by denying Defendant's request for full probation. After a review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Amber D. Haas, Sevierville, Tennessee, for the appellant, Dale Ray Mills.

Paul G. Summers, Attorney General and Reporter; Leslie Price, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

On April 3, 2004, Lieutenant Steve Rose with the Sevierville Police Department stopped a van for a registration violation and a brake light that was not working. Lieutenant Rose testified that he approached the van to talk with the driver, that the driver rolled down his window, and that Lieutenant Rose smelled a strong odor of alcohol. Lieutenant Rose asked the driver for identification, and the driver gave it to him. Defendant, who was sitting in the passenger seat, also gave the officer identification. Lieutenant Rose asked the driver to get out of the van and determined that the smell of alcohol was not on the driver's person. He began writing the driver a citation for

the registration violation and a warning for the brake light. He also ran a computer check on Defendant's identification. The check revealed that Defendant had an outstanding warrant. Lieutenant Rose arrested Defendant and searched him incident to the arrest. During the search, Lieutenant Rose checked the right pocket of Defendant's coveralls and found a baggie containing a cigarette and two marijuana "roaches." The marijuana weighed 1.8 grams, and Lieutenant Rose charged Defendant with simple possession.

Defendant testified that he did not have marijuana on his person and that Lieutenant Rose was lying. He said that Lieutenant Rose told him to get out of the van and searched him. Defendant emptied his pockets, and Lieutenant Rose "proceeded right back to the passenger side, searched that area, [and] had something in his hand." Lieutenant Rose walked back to Defendant, searched him again, and said, "Oh, what's this? I found this in your pocket." Defendant told Lieutenant Rose, "No, sir. It is the driver's. You never found that in my possession. I don't smoke pot no more." Defendant requested that Lieutenant Rose talk with the driver about the marijuana, but the officer said, "No sir. You got a warrant on you. It's your fault, so you're the one taking the blame."

II. Sufficiency of the Evidence

Defendant argues that the evidence is insufficient to support the conviction because the State's case lacks substantial corroboration. He contends that his version of the events is just as logical as the State's version and that Lieutenant Rose's testimony is suspect because Lieutenant Rose could not remember the names of other law enforcement officers who were at the scene but could remember the exact location of the marijuana seized.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

The determination of whether Defendant possessed the marijuana rested with the jury's assessment of the credibility of the witnesses. Based on its verdict of guilty, the jury obviously accredited Lieutenant Rose's testimony that Defendant had marijuana in his pocket. We conclude

that the evidence is sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Defendant committed the offense of misdemeanor marijuana possession. Defendant is not entitled to relief on this issue.

III. Sentencing

Defendant argues that his sentence is excessive because the trial court considered improper enhancement factors. Specifically, he argues that the trial court improperly enhanced his sentence because the trial court believed Defendant made a poor witness and gave perjured testimony at trial. Defendant also contends that the trial court erred by denying his request for full probation.

When a defendant challenges the length, range, or manner of service of a sentence, this Court conducts a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a *de novo* review of a sentence, this Court must consider (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, and -210; *State v. Smith*, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401, Sentencing Commission Comments; *Ashby*, 823 S.W.2d at 169.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides, in part, that the trial court shall impose a specific sentence that is consistent with the purposes and principles of the 1989 Sentencing Reform Act. *See* T.C.A. § 40-35-302(b). Although the Sentencing Reform Act typically treats misdemeanants and felons the same, misdemeanants are not given the presumption of a minimum sentence. *See State v. Seaton*, 914 S.W.2d 129, 133 (Tenn. Crim. App. 1995). A separate sentencing hearing is not required in misdemeanor sentencing, but the trial court must "allow the parties a reasonable opportunity to be heard on the question of the length of any sentence and the manner in which the sentence is to be served." T.C.A. § 40-35-302(a). A misdemeanor sentence, unlike a felony sentence, has no sentence range. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

The trial court is allowed greater flexibility in setting misdemeanor sentences than felony sentences. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999). The trial court, however, must impose a specific sentence for a misdemeanor conviction consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. T.C.A. § 40-35-302(d); *State v. Palmer*, 902 S.W.2d 391, 394 (Tenn. 1995). The trial court should consider enhancement and mitigating

factors in making its sentencing determinations; however, unlike the felony sentencing statute, which requires the trial court to place its findings on the record, the misdemeanor sentencing statute "merely requires a trial judge to consider enhancement and mitigating factors when calculating the percentage of a misdemeanor sentence to be served in confinement." *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). The misdemeanor offender must be sentenced to an authorized determinate sentence with a percentage of not greater than seventy-five percent to be served by the defendant before he or she is eligible for rehabilitative programs. T.C.A. § 40-35-302(b) and (d). When a defendant challenges a misdemeanor sentence, this Court conducts a *de novo* review with a presumption that the trial court's determinations are correct. *Id*. § 40-35-401(d).

In this case, no witnesses testified at the sentencing hearing, and the parties did not introduce Defendant's presentence report into evidence. However, Defendant stipulated to his having a 1995 conviction for driving under the influence and a 2000 conviction for misdemeanor possession of marijuana. Defendant's attorney requested that the trial court consider that the amount of marijuana in the instant case was small and that Defendant was cooperative. The trial court noted that the jury had convicted Defendant after deliberating only fourteen minutes and concluded that the jury "didn't buy a word" of Defendant's story. It sentenced Defendant to eleven months, twenty-nine days to be served as 150 days in jail, day for day, and the remainder on supervised probation. The trial court stated that the sentence was based upon Defendant's trial testimony, his prior convictions, and the overwhelming proof in the case.

In determining the length of Defendant's sentence, the trial court properly considered that Defendant "has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," which is a legitimate enhancement factor. *See* T.C.A. § 40-35-114(2) (2003). Moreover, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5). In this case, the trial court specifically found that Defendant "flat-out lied" in his testimony. Lack of candor shows a lack of potential for rehabilitation and weighs against a totally suspended sentence. *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). We conclude that the length and manner of service of the sentence imposed by the trial court was appropriate. However, we note that the trial court's ordering Defendant to serve 150 days "day for day" in the county jail does not bar him from earning good conduct credits towards the jail time. *State v. Clark*, 67 S.W.3d 73, 78 (Tenn. Crim. App. 2001). The judgment is modified to reflect that Defendant is entitled to earn good conduct credits and the requirement of "day for day" service is deleted.

CONCLUSION

Based on the foregoing, the judgment of the trial court is affirmed as modified. Defendant will be entitled to earn sentence reduction credits, which will apply toward his period of confinement in the county jail.

_____

THOMAS T. WOODALL, JUDGE